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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	
	)	RM-7739
	)	RM-7740
	)	RM 7741

To: The Commission

COMMENTS OF
NEW MIAMI LATINO BROADCASTING CORPORATION

New Miami Latino Broadcasting Corporation, licensee of WDLP-TV, Miami, submits the following comments pursuant to Order, DA 93-1064, released September 1, 1993 extending the public comment period in this proceeding until October 13, 1993.

Background

In its NPRM, GC Docket No. 92-52, FCC 93-363, released August 12, 1993, the Commission proposes to amend 47 CFR § 73.3597(a)(1) to require certain licensees to operate their broadcast stations for three (3) years before being eligible to transfer them. The NPRM emerged from the FCC's omnibus proceeding to reform the comparative hearing criteria. See Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 2554 (1992).

The NPRM proposes to apply a new, three-year "service continuity requirement" to all existing as well as to future authorizations received through the comparative hearing process. NPRM, supra, at ¶16, emphasis added. The Commission argues that

the "immediate application" of this new rule would "maximize its [the rule's] effectiveness." Id.

The NPRM also seeks comments whether the three-year "holding" rule, if adopted, should be applicable to broadcast grants made pursuant to settlement agreements. The FCC's current one-year holding rule specifically excludes grants made pursuant to settlement agreements in comparative proceedings. See 47 CFR § 73.3597(a)(1) (1992).

Discussion

ANY RULE CHANGE SHOULD BE APPLIED PROSPECTIVELY ONLY

New Miami Latino Broadcasting Corporation opposes the FCC's proposal to apply any new "holding" rule retroactively. Such a decision would be unlawful, arbitrary and capricious.

It is clear that the FCC's application of changes in its "holding" or "anti-trafficking" rules to existing licensees would be a "retroactive" application of a new rule. Indeed, the Commission recognized in its 1992 NPRM in this docket that its application of any rule changes "prospectively" would involve applying the new rule to pending broadcast applications. See Reexamination of the Policy Statement, supra, 7 FCC Rcd at 2669 ¶41. [1] Hence, the FCC's application of any new "holding" rule to existing licensees would constitute a retroactive application of the new rule.

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[1] The Commission reasoned then that the fairest application of the new rule would be to applicants not yet designated for hearing as of the effective date of the new rule. Id., 7 FCC Rcd at 2669 ¶ 41.

It is well established that "retroactivity is not favored in the law." See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). Even where an agency argues with "substantial justification" for retroactive rulemaking, the courts will not permit it absent an "express" statutory grant of authority. Id., 488 U.S. at 208-9. The Communications Act of 1934 contains no "express grant" of retroactive rulemaking authority to the FCC in these circumstances. See 47 U.S.C. § 301 et seq. Nor is there any evidence of legislative intent for such a grant of retroactive rulemaking authority to the FCC in such circumstances.

In notice-and-comment rulemaking proceedings before the FCC, the Administrative Procedure Act precludes the retroactive application of new rules. In fact, the APA defines a "rule" as an agency statement "of general or particular applicability and future effect..." See 5 U.S.C. § 551(4); see also 1947 Attorney General's Manual on the Administrative Procedure Act at 13-14 (rule includes agency statement of future effect). And, while the Congress may possess the constitutional right to retroactively change its laws, [2] the Administrative Procedure Act forbids retroactive rulemaking by federal agencies absent an express Congressional authorization. Id., 488 US. at 223-4. Indeed, as one Supreme Court Justice has observed:

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[2] Retroactive legislation is generally disfavored. See Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

> "In short, there is really no alternative except the obvious meaning, that a rule is a statement that has legal consequences only for the future."

Bowen v. Georgetown University Hospital, supra, 488 U.S. at 217 (Scalia, J., concurring), emphasis added. In sum, the FCC's retroactive application of a new holding rule to existing licensees would be unlawful. Id.; accord PBW Stock Exchange, Inc. v. SEC, 485 F. 2d 718, 732 (3d Cir. 1973), cert. denied, 416 U.S. 969 (1974) ("...[R]ules ordinarily look to the future and are applied prospectively only..."); Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 388 (D.C. Cir. 1972) (rules resulting from formal rulemaking proceedings "are prospective in application only"), emphasis added.[3]

Moreover, even if the FCC's application of a new three-year holding rule to existing licensees were erroneously construed as having only a "secondary" retroactive effect, it would be unreasonable, arbitrary and capricious when applied to parties such as New Miami Latino Broadcasting Corporation. See id., 488 U.S. at 220-1. The Hispanic owner of New Miami Latino Broadcasting Corporation made a $3.0 million investment in 1991-92 to settle an 7-year-old FCC proceeding, to obtain a permit, to construct and finally to commence broadcasting on channel 35 in

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[3] In the most prominent exception to the general rule, the D.C. Circuit Court sustained a technically "retroactive" rule under Section 4(c) of the APA where (i) the degree of retroactivity was less than 120 days, (ii) the effective date had been given by Public Notice four months prior thereto, and (iii) the retroactivity was technical only, occuring because of subsequent extensions in the comment period. Compare Citizens to Save Spencer County v. EPA, 600 F.2d 844, 880 (D.C. Cir. 1979).

Miami as that city's only minority-owned, full-power television station. At the time of his substantial investment, the minority owner of channel 35 relied on (i) the FCC's 1982 repeal of its prior three-year holding rule[4] and (ii) the FCC's refusal to extend its one-year holding rule, adopted in 1985, to cases involving settlements of comparative cases.[5] In short, the Hispanic owner of Channel 35 in Miami relied on the FCC's holding rules in deciding to invest over $3 million in a start-up, UHF television station despite the existence of a generally unfavorable market for such UHF start-ups. A key factor for making that substantial investment was the owner's reliance on FCC rules that would permit him to seek a transfer of control if continuing operations against entrenched competitors proved too costly to sustain after a year or so.

In fact, the Miami TV market -- hit hard by Hurricane Andrew in August 1992 -- has indeed proved to be a far more difficult business challenge for New Miami Latino Broadcasting Corporation than was reasonably anticipated in 1991-92. The FCC's attempt to retroactively impose a new holding rule on New Miami Latino Broadcasting Corporation -- forcing it to maintain its current ownership structure until 1996 -- would unreasonably and arbitrarily prejudice the Hispanic owner of Channel 35 and disserve the greater public interest. See Bowen v. Georgetown

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[4] See Transfer of Broadcast Facilities, 52 RR2d 1081 (1982).

[5] See Transfer of Broadcast Facilities, 99 FCC 2d 971 (1985).

University Hospital, supra, 488 U.S. at 220-21; National Association of Independent Television Producers and Distributors v. FCC, 502 F. 2d 249, 254-5 (2d Cir. 1974) (FCC rule with retroactive consequences held unreasonable).

Finally, adoption of a new holding rule with retroactive application would arbitrarily depart from the FCC's own previous, contrary determinations. The agency concluded just one year ago that a retroactive application of any change in its holding rules would be unfairly prejudicial to parties who detrimentally have relied on then-existing holding rules. See Reexamination of Policy Statement, supra, 7 FCC Rcd at 2669 ¶41. The FCC now states that its prior determination does not appear relevant, arguing that the new holding rule would not prejudice comparative applicants because no "evaluation" of applicants under a "service continuity factor" is being proposed. The FCC ignores, however, that retroactive application of a new holding rule would unfairly prejudice those parties who have completed the comparative hearing process and been licensed. The FCC ignores the substantial prejudice to all permittees and licensees who have detrimentally relied on existing holding rules during the past three years -- those very parties who would be prejudiced directly by a subsequently-imposed constraint on their ability to transfer control of their licenses when such transfers would otherwise be favored as in the public interest.[6]

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[6] Given the FCC's recognition of the current economic hardships faced by many UHF licensees, it would be arbitrary (continued)

CONCLUSION

The Commission should not apply any change in its holding rules to existing licensees.

Respectfully submitted,

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should the FCC retroactively apply a three-year holding rule to existing licensees that does not exempt UHF licensees.